Supreme Court, U.S.
FILED

981758 MAY 3 1999

OFFICE OF THE CLERK

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

PARKWOOD DEVELOPMENTAL CENTER, INC. and TEMPLETON SCHOOL OF SPECIAL EDUCATION, INC.,

*Petitioners,*

*v.*

NATIONAL LABOR RELATIONS BOARD and UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1996,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## PETITION FOR A WRIT OF CERTIORARI

CLIFFORD H. NELSON, JR.
*Counsel of Record*
FRANCINE N. SILVERSTEIN
WIMBERLY, LAWSON, STECKEL, NELSON & SCHNEIDER, P.C.
*Attorneys for Petitioners*
Suite 400, Lenox Towers
3400 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 365-0900

152752

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

32 pp

## QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals improperly enforced an Order of the National Labor Relations Board (the "NLRB" or the "Board"), which improperly certified the results of a representation election by finding the Union's offer to waive initiation fees proper, even though the Union's offer to waive initiation fees was admittedly not made in accordance with the requirements set forth in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 94 S. Ct. 495 (1973).

## STATEMENT PURSUANT TO RULE 29.6

Neil L. Pruitt Corporation and United Health Services, Inc. are the parent companies of Parkwood Developmental Center, Inc. and Templeton School of Special Education, Inc.

The Petitioners have no subsidiary companies.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Statement Pursuant to Rule 29.6 | ii |
| Table of Contents | iii |
| Table of Cited Authorities | iv |
| Table of Appendices | v |
| Opinions Below | 1 |
| Statement of Jurisdiction | 1 |
| Statement of the Case | 2 |
| A. Course of Proceedings | 2 |
| B. Statement of Facts | 4 |
| C. Basis for Federal Jurisdiction in the Court of First Instance | 6 |
| Reason for Granting the Writ | 7 |
| Conclusion | 11 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) ..... 8

*Days Inns*, 216 NLRB 384 (1975) ..... 10

*Kent Field Medical Hospital*, 219 NLRB 174 (1975) ..... 10

*NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 94 S. Ct. 495 (1973) ..... i, 6, 7, 8, 9, 10

*NLRB v. VSA, Inc.*, 24 F.3d 588 (4th Cir. 1994) ... 8

*NLRB v. WFMT*, 997 F.2d 269 (7th Cir. 1993) .... 8, 9

*Vicksburg Hospital, Inc. v. NLRB*, 653 F.2d 1070 (5th Cir. 1981) ..... 7, 8

**Statutes:**

28 U.S.C. § 1254(1) ..... 1

29 U.S.C.A. § 160(e) ..... 7

## TABLE OF APPENDICES

*Page*

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed December 1, 1998 ..... 1a

Appendix B — Decision And Order Of The National Labor Relations Board Dated And Filed March 30, 1998 ..... 4a

Appendix C — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated And Filed February 4, 1999 ..... 14a

## OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Eleventh Circuit in *National Labor Relations Board v. Parkwood Developmental Center, Inc., and Templeton School of Special Education, Inc.*, Case No. 98-8627 (11th Cir. 1998) is set forth in Appendix A at 1a.

The opinion in *Parkwood Developmental Center, Inc., and Templeton School of Special Education, Inc., as joint employers and United Food and Commercial Workers Union, Local 1996, AFL-CIO, CLC*, is reported at 325 NLRB No. 89 (1998) and is set forth in Appendix B at 4a.

## STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Eleventh Circuit on December 1, 1998.

The United States Court of Appeals for the Eleventh Circuit denied Petitioners' Petition for Rehearing and Petition for Rehearing En Banc on February 4, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

### A. Course of Proceedings

Parkwood Developmental Center, Inc., a Georgia Corporation, and Templeton School of Special Education, Inc., a Georgia Corporation (hereinafter collectively referred to as "Parkwood" or "Petitioners"), are joint employers with offices and a place of business located at 1501 Lee Street, Valdosta, Georgia 31602. Parkwood Developmental Center, Inc. and Templeton School of Special Education, Inc. are jointly engaged in business as an intermediate care facility for the mentally retarded and a special education school.

The United Food and Commercial Workers Union, AFL-CIO, CLC Local Union 1996 (hereinafter referred to as the "Union" or "UFCW") filed a Petition for Certification of Representative on January 31, 1997, to become the bargaining representative for the employees at Parkwood's Valdosta facility. The parties entered into a Stipulated Election Agreement, approved by the Regional Director of Region 12 of the NLRB on February 25, 1997, pursuant to which an election was held on April 10, 1997.[1] At the conclusion of the election, the Tally of Ballots reflected that a majority of the employees eligible to vote cast ballots in favor of representation by the Union.

Parkwood filed objections to the election on April 16, 1997, based upon both the conduct of the election and

---

1. The parties agreed in the Stipulated Election Agreement that the appropriate collective bargaining unit would consist of approximately 173 employees, and include housekeepers, laundry employees, nursing professionals, and others. (R5-530-531).

conduct affecting the election. The objections focused on several concerns, including perceptions of impropriety concerning the sanctity of the ballot box and Union offers to waive initiation fees which were made to only a portion of the employees eligible to vote in the election. Upon investigation of Parkwood's Objections, the Board directed, by Order dated May 2, 1997, that a hearing beginning on May 15, 1997 be held to resolve the issues raised by Parkwood's Election Objections. After that hearing, the Hearing Officer issued, on September 2, 1997, her Report and Recommendations on Objections (the "Report"), and concluded that Parkwood's objections raised no material or substantial issues affecting the results or conduct of the election.

Parkwood excepted to several of the Hearing Officer's findings of fact and conclusions of law, including her finding that certain gift certificates provided to some employees by the Union, which entitled the holders thereof to a waiver of initiation fees and assessments, were not unlawful financial inducements to vote for the Union.[2]

---

2. Parkwood also excepted to the Hearing Officer's findings and conclusion that the Board agent's conduct in failing to properly seal the ballot box and the resulting condition of the ballot box after the break between voting sessions — which consisted of a loosening of the tape, a 1/4 inch gap along the bottom edge of the box, and a folded ballot sticking out of the bottom edge, were not significant enough to cast a doubt or cloud over the integrity of the ballot box such that the election should be overturned. Parkwood also initially excepted to the Hearing Officer's conclusion that the Union's material misrepresentations of fact, regarding contract ratification, strike authorization, and other internal union procedures, did not affect the employees' right to a free and fair choice, but withdrew this issue from consideration by the Eleventh Circuit Court of Appeals. Neither of these issues are currently before this Court for review.

Notwithstanding Parkwood's exceptions, on November 7, 1997, the NLRB summarily adopted the Hearing Officer's findings without any analysis whatsoever.

In order to test the validity of the Board's rulings on its election objections, Parkwood refused to bargain with the Union, following its certification as collective bargaining representative. Through the application of summary judgment in the unfair labor practice proceedings, the Board ordered Parkwood to bargain with the Union. Upon Parkwood's refusal to bargain, the Board petitioned the Eleventh Circuit Court of Appeals to enforce its Order. The Eleventh Circuit granted the Board's petition and enforced the Board's Order. By enforcing the Board's Order in this case, the Eleventh Circuit Court of Appeals failed to follow the law of the United States Supreme Court. Therefore, Parkwood now requests that this Court grant its petition for writ of certiorari, and review the decision of the Eleventh Circuit.

**B. Statement of Facts**

During the last stage of the election campaign, the Union distributed a certificate or voucher to some employees who were eligible to vote in the election. These certificates or vouchers provided that the *holder* thereof would be exempt from having "to pay initiation fees of any kind, nor any fees other than the regular monthly dues." (R4-Emp. Ex. 2).[3]

All employees eligible to vote did not receive the certificates. (R3-225, 227, 281, 282). Since the Union chose

3. All record cites in this petition reference the record in the Eleventh Circuit Court of Appeals.

to mail the certificates, some employees had moved or for other reasons did not receive a personal certificate. (R3-282, 283). These certificates were not distributed in any other manner. The Union did not make a unit wide offer to waive initiation fees by distributing a handbill which did not limit the fee waiver solely to holders of the certificates. Nor did the Union verbally make a unit wide offer to waive initiation fees at a meeting held by the Union. Though both of these methods would have ensured that the Union's offer to waive initiation fees was universally extended to *all* employees, the Union chose not communicate its waiver offer in such a manner during the campaign. Therefore, only those employees who actually received a certificate and subsequently presented it to the Union would be eligible for the waiver. (R4-Emp. Ex. 2).

The certificate specifically stated that "it will be recognized as valid only if presented to the union not later than thirty (30) days after the union agreement is in effect with present employer." (R4-Emp. Ex. 2). Thus, the Union exhorted to those who received the certificate: "This certificate is valuable to you, DON'T LOSE IT!" (R4-Emp. Ex. 2). According to the eligibility requirements stated on the certificates themselves, having possession of a certificate and presenting it to the Union were prerequisites for the waiver of the Union's initiation fees. Those employees who did not receive a certificate in the mail were simply out of luck — they would have nothing to present — no coupon entitles them to no waiver of hundreds of dollars of union related charges.

Following the election in this case, Parkwood objected to the Union's use of the certificates and their partial distribution to employees. Parkwood complained that the

certificates described above were unlawful financial inducements that interfered with employees' free and fair choice in the election. Parkwood further contended that the certificates were not proper offers to waive initiation fees because the Union violated the requirements of *Savair*[4] that outline the circumstances under which an offer to waive initiation fees may be valid.

Notwithstanding Parkwood's objections, the Board decided that the certificates were not unlawful financial inducements, even though they admittedly were not issued in accordance with the requirements of *Savair*. Upon review by the Eleventh Circuit Court of Appeals, through the Board's Application for Enforcement of its Order, the Court failed to enforce the requirements for initiation fee waivers set forth by the Supreme Court in *Savair*. As a result, the Eleventh Circuit's decision in this case directly contradicts the Supreme Court's decision in *Savair*. Therefore, Petitioners respectfully request that this Court grant its petition for writ of certiorari and review the decision of the Eleventh Circuit Court of Appeals in this case.

### C. Basis for Federal Jurisdiction in the Court of First Instance

This case came before the Eleventh Circuit Court of Appeals pursuant to an Application for Enforcement filed by the NLRB. The representation case at issue in this proceeding could not have been brought before the Eleventh Circuit directly for review. Only when an employer refuses to recognize the certification of a collective bargaining representative and is found to have committed an unfair

---

4. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 94 S. Ct. 495 (1973).

labor practice for its subsequent refusal to bargain, can the issues surrounding the election be scrutinized by an appellate court. Once the Board has made a determination that an employer has refused to bargain with the certified bargaining representative, the representation case and unfair labor practice case can then be treated as a singular entity and the complete record is fully reviewable. 29 U.S.C.A. § 160(e). These procedures were followed in the case *sub judice* so as to permit judicial review of the Board's certification of the election results in the instant representation case.

## REASON FOR GRANTING THE WRIT

The Board, and the Eleventh Circuit by enforcing the Board's Order, failed to apply existing case precedent established by the Supreme Court in *NLRB v. Savair Mfg. Co.*, 414 U.S. at 270, 94 S. Ct. at 495, by finding that the certificates the Union offered to some, but not all, employees during the election were lawful. Because the Eleventh Circuit failed to reconcile the Board's decision with the plain language of *Savair*, requiring that offers to waive initiation fees be made to *all* employees, the Eleventh Circuit's decision is in direct conflict with the precedent of the Supreme Court. Therefore, this case is appropriate for review by the Supreme Court.

In *NLRB v. Savair Mfg. Co.*, 414 U.S. at 270, 94 S. Ct. at 495, the Supreme Court specifically held that a waiver of initiation fees must be offered to **all employees**, and must not be conditioned upon pre-election union support. *Id.* at 496 n.4. If an initiation fee waiver does not apply equally to **all** employees, then the waiver will provide a sufficient basis for setting aside the election. *Vicksburg Hospital, Inc.*

*v. NLRB*, 653 F.2d 1070 (5th Cir. 1981);[5] *NLRB v. VSA, Inc.*, 24 F.3d 588 (4th Cir. 1994) (*Savair* indicates in *dicta* that waivers of initiation fees must be offered "across-the-board").

*Savair* expressly requires an initiation fee waiver to be offered "to all new members" for the laboratory conditions for a fair and free election to be preserved. *Savair*, 414 U.S. at 270, 94 S. Ct. at 496 n.4. The failure to require an across-the-board waiver would permit unions to display a type of preferential treatment and favoritism that clearly violates the National Labor Relations Act. Therefore, to prevent the union from buying endorsements and painting a false portrait of employee support during an election, an initiation fee waiver must be offered to all employees. *See NLRB v. WFMT*, 997 F.2d 269 (7th Cir. 1993).

In *WFMT*, several employees of the union contributed $3,000 to $4,000 to an initiation fee fund to pay the union dues for those employees financially unable to afford the union's $300 initiation fee. The company argued that the establishment of this initiation fee fund warranted setting the election aside because it was an impermissible promise of a benefit that violated *Savair*. In finding the initiation fee fund to be a lawful offer to waive initiation fees, the Board relied on the fact that the fund was "available for *all* employees in the bargaining unit." *Id.* at 276 (emphasis in original). Because the fund was available to **all** employees, the Board found that the offer did not rise to the level of unjustly allowing the union to buy endorsements and paint

5. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

a false portrait of employee support during its election campaign. *Id.*

In this case, unlike in *WFMT*, the offer to waive initiation fees was *not* offered to **all** employees. It is undisputed that **all** employees eligible to vote in the election did *not* receive certificates or vouchers from the Union. There were approximately 173 employees in the appropriate collective bargaining unit. Of these 173 employees, at least *nine* employees did not receive certificates. Inasmuch as the evidence is uncontraverted that at least nine employees, who were still employed by Parkwood and eligible to vote in the election (R3-304), were never presented with the certificates that purported to waive the initiation fees, all employees were not entitled to an initiation fee waiver pursuant to the certificate. (R3-225, 304). As a result, the UFCW failed to fulfill its legal obligation to convey its offer to waive initiation fees in an across-the-board fashion to all employees. Therefore, the waiver offer unjustly allowed the union to buy endorsements and paint a false portrait of employee support during its election campaign. *WFMT*, 997 F.2d 276.

The Union argues that it should not be penalized for failing to unconditionally offer the waiver to all employees because it mailed the waiver to employees at the addresses provided by Parkwood in its *Excelsior* list. There is no evidence in the record, however, to suggest that the addresses contained on the *Excelsior* list, which was prepared and submitted over one month prior to the date the Union mailed its certificates, were either incomplete or inaccurate. Furthermore, Parkwood was not required to insure 100% accuracy when it provided the names and

addresses of employees on the *Excelsior* list.[6] Therefore, it was at the Union's risk to mail the certificates to the employees' addresses as shown on the *Excelsior* list. Nor was there any evidence at trial that the addresses to which the certificates were sent even conformed to the addresses contained on the list. The Union should not be able to escape liability for failing to offer the certificates to *all* employees just because its decision to use the *Excelsior* list proved to be ineffective.

Notwithstanding that the Union clearly failed to comply with a substantial requirement of *Savair*, the Board held that the certificates were lawful offers to waive initiation fees. The Board's decision, enforced by the Eleventh Circuit, completely ignores the substance and effect of the Supreme Court's decision. The certificates in this case violated a specific requirement of *Savair*, impermissibly interfered in the election, and allowed the Union to buy endorsements and paint a false portrait of employees' sentiment. Therefore, the election in this case should have been set aside and a second election ordered.

By failing to set aside the election in this case and order a second election, the Eleventh Circuit Court of Appeals disregarded the Supreme Court's decision in *Savair*. Therefore, Petitioners respectfully request that this Court grant its petition for writ of certiorari and review the decision of the Eleventh Circuit Court of Appeals.

---

6. *See Kent Field Medical Hospital*, 219 NLRB 174 (1975) (the Board excused an employer a 7% error factor in submitting incorrect addresses and omitting names, finding that an error of such magnitude did not amount to "insubstantial compliance" with the *Excelsior* rule) and *Days Inns*, 216 NLRB 384 (1975) (the Board held a 13% error factor in the addresses of eligible voters was neither gross neglect nor an absence of good faith warranting a new election).

## CONCLUSION

Accordingly, petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

CLIFFORD H. NELSON, JR.
*Counsel of Record*
FRANCINE N. SILVERSTEIN
WIMBERLY, LAWSON, STECKEL,
NELSON & SCHNEIDER, P.C.
*Attorneys for Petitioners*
Suite 400, Lenox Towers
3400 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 365-0900

# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED DECEMBER 1, 1998**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8627
Non-Argument Calendar

**NLRB No. 12-CA-19239**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

PARKWOOD DEVELOPMENTAL CENTER INC., TEMPLETON SCHOOL OF SPECIAL EDUCATION, INC.,

Respondents,

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1996,

Intervenor.

**Application for Enforcement of an Order of the National Labor Relations Board**

**(December 1, 1998)**

*Appendix A*

Before BIRCH, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

This case is before us on the application of the National Labor Relations Board (the "Board") to enforce an order of the Board against Parkwood Developmental Center and Templeton School of Special Education, Inc. (the "Respondents").

The issue presented is whether the Board reasonably exercised its discretion in overruling the Respondents' election objections, and therefore properly found that the Respondents violated § 8(a)(5)(1) of the National Labor Relations Act by refusing to bargain with the Union as the duly certified representative of a unit of the Respondents' employees.

The Respondents first contend that the Board's agent in charge of the election failed to fully and completely seal the ballot box used in the election and that these circumstances put in question the integrity of the election, necessitating a new election. A Board conducted election, however, is presumed fair and regular. *See NLRB v. IDAB, Inc.*, (11th Cir. 1985). In addition,

> [t]he Board has a wide degree of discretion in conducting elections and resolving representation matters. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330-31, 67 S.Ct. 324, 327, 91 L.Ed. 322 (1946); *NLRB v. Osborne Transportation, Inc.*, 589 F.2d 1275, 1279 (5th

> Cir. 1979). In a challenge to a Board decision in this area, the burden is on the objecting party to prove by specific evidence that the election results did not accurately reflect the unimpeded choice of the employees. *NLRB v. White Knight Mfg.*, 474 F.2d 1064, 1067 (5th Cir. 1973); *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 29 (5th Cir. 1969).

*Daylight Grocery Co. v. NLRB*, 678 F.2d 905, 909 (11th Cir. 1982). We review Board decisions in this area under the substantial evidence standard. *See NLRB v. Dixie Lime & Stone Co.*, 737 F.2d 1556, 1559 (11th Cir. 1984), (quoting *TRW-United Greenfield Division v. NLRB*, 716 F.2d 1391, 1393 (11th Cir. 1983)).

After carefully reviewing the record, we conclude that substantial evidence supports the Board's decisions to overrule Respondents' election objections and certify the Union as the bargaining representative for its workers. We also conclude that the Respondents' argument that the Union impermissibly waived initiation fees and dues in violation of the standards adopted in *NLRB v. Savair Manufacturing. Co.*, 414 U.S. 270 (1973), is meritless. Accordingly, we grant the Board's petition for enforcement of its order against the Respondents.

PETITION ENFORCED.

## APPENDIX B — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED AND FILED MARCH 30, 1998

* * *

March 30, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND BRAME

Pursuant to a charge filed on January 12, 1998, the General Counsel of the National Labor Relations Board issued a complaint on January 26, 1998, alleging that the Respondents have violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 12-RC-8055. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondents filed an answer admitting in part and denying in part the allegations in the complaint.

On February 23, 1998, the General Counsel filed a Motion for Summary Judgment. On February 27, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondents filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

*Appendix B*

Ruling on Motion for Summary Judgment

In its answer the Respondents admit their refusal to bargain, but attacks the validity of the certification on the basis of their objections to the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondents do not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor do they allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondents have not raised any representation issue that is properly litigable in this unfair labor practice proceeding. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondents, Georgia corporations, with an office and place of business in Valdosta, Georgia, have been engaged in the business of operating an intermediate care facility for the mentally retarded and a special education institute. At all material times, Respondent Parkwood Developmental Center, Inc.

and Templeton School of Special Education, Inc., have been joint employers of the employees in the unit described below. During the 12-month period preceding issuance of the complaint, the Respondents, in conducting their business operations, derived gross revenues in excess of $100,000 and purchased and received at their Valdosta, Georgia facility goods and materials valued in excess of $5000 directly from points located outside the State of Georgia. We find that the Respondents are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

### A. *The Certification*

Following the election held April 10, 1997, the union was certified on November 7, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees of the Respondents including custodians, housekeeping aides, unit housekeepers, laundry employees, maintenance employees, car/bus drivers, horticulturists, cooks, assistant cooks, dietary aides, dietary AM/PM janitors, social work technicians, direct care staff employees, direct care team leaders, medication nurses, treatment nurses, infection control nurses, physical health records nurses, transportation and

appointment specialists, behavior program aides, activities center staff, behavior program aide/data specialists, transportation aides, sensorimotor therapists, and teacher aides, but not including receptionist, secretary to the administrator, purchasing coordinator, accounting /bookkeeper, clerical assistant for Templeton School, QMR records auditor, clinical records staff, computer data and program specialist, computer specialist and assistant to Personnel Director, professional employees, managerial employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since November 24, 1997, the Union has requested the Respondents to bargain, and, since that date, the Respondents have refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after November 24, 1997, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

*Appendix B*

REMEDY

Having found that the Respondents have violated Section 8(a)(5) and (1) of the Act, we shall order them to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondents begin to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 N.L.R.B. 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied, 379 U.S. 817 (1964); *Barnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondents, Parkwood Development Center, Inc. and Templeton School of Special Education, Inc., Valdosta, Georgia, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food and Commercial Workers Union Local 1996, AFL-CIO, CLC as the exclusive bargaining representative of the employees in the bargaining unit.

*Appendix B*

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees of the Respondents including custodians, housekeeping aides, unit housekeepers, laundry employees, maintenance employees, car/bus drivers, horticulturists, cooks, assistant cooks, dietary aides, dietary AM/PM janitors, social work technicians, direct care staff employees, direct care team leaders, medication nurses, treatment nurses, infection control nurses, physical health records nurses, transportation and appointment specialists, behavior program aides, activities center staff, behavior program aide/data specialists, transportation aides, sensorimotor therapists, and teacher aides, but not including receptionist, secretary to the administrator, purchasing coordinator, accounting/bookkeeper, clerical assistant for Templeton School, QMR records auditor, clinical records staff, computer data and program

specialist, computer specialist and assistant to Personnel Director, professional employees, managerial employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Valdosta, Georgia, copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 12 after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since November 24, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

---

1. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

*Appendix B*

Dated, Washington, D.C. March 30, 1998

William B. Gould IV, Chairman

Sarah M. Fox, Member

J. Robert Brame III, Member

*Appendix B*

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER
OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Food and Commercial Workers Union Local 1996, AFL-CIO, CLC as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time employees of Parkwood Developmental Center, Inc. and Templeton School of Special Education, Inc. including custodians, housekeeping aides, unit housekeepers, laundry employees, maintenance employees, car/bus drivers, horticulturists,

cooks, assistant cooks, dietary aides, dietary AM/PM janitors, social work technicians, direct care staff employees, direct care team leaders, medication nurses, treatment nurses, infection control nurses, physical health records nurses, transportation and appointment specialists, behavior program aides, activities center staff, behavior program aide/data specialists, transportation aides, sensorimotor therapists, and teacher aides, but not including receptionist, secretary to the administrator, purchasing coordinator, accounting/bookkeeper, clerical assistant for Templeton School, QMR records auditor, clinical records staff, computer data and program specialist, computer specialist and assistant to Personnel Director, professional employees, managerial employees, guards and supervisors as defined in the Act.

PARKWOOD DEVELOPMENTAL CENTER, INC. AND TEMPLETON SCHOOL OF SPECIAL EDUCATION, INC.

**APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 4, 1999**

**IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

No. 98-8627

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

PARKWOOD DEVELOPMENTAL CENTER INC., TEMPLETON SCHOOL OF SPECIAL EDUCATION, INC.,

Respondents,

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1996,

Intervenor.

Application for Enforcement of an Order of the National Labor Relations Board

*ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC*
(Opinion _____, 11th Cir., 19__, __ F.2d __

*Appendix C*

Before: BIRCH, DUBINA, and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
MAY 24 1999
CLERK

(2)

No. 98-1758

# In the Supreme Court of the United States

PARKWOOD DEVELOPMENTAL CENTER, INC. AND TEMPLETON SCHOOL OF SPECIAL EDUCATION, INC., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD AND UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1996

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

SETH P. WAXMAN
*Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

FREDERICK L. FEINSTEIN
*General Counsel*
LINDA SHER
*Associate General Counsel*
NORTON J. COME
*Deputy Associate General Counsel*
JOHN EMAD ARBAB
*Attorney*
*National Labor Relations Board*
*Washington, D.C. 20570*

1998

## QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that a union's pre-election offer to waive initiation fees did not interfere with the certification election, since the offer was extended to all employees and was not conditioned upon any employee's pre-election support for the union.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Statement | 2 |
| Argument | 4 |
| Conclusion | 8 |
| Appendix A | 1a |
| Appendix B | 4a |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Amalgamated Clothing Workers* v. *NLRB*, 345 F.2d 264 (2d Cir. 1965) | 5 |
| *De Jana Indus., Inc.*, 305 N.L.R.B. 294 (1991) | 7 |
| *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966) | 3 |
| *Molded Acoustical Prods., Inc.* v. *NLRB*, 815 F.2d 934 (3d Cir.), cert. denied, 484 U.S. 925 (1987) | 6 |
| *NLRB* v. *Savair Mfg. Co.*, 414 U.S. 270 (1973) | 2, 5, 7 |
| *NLRB* v. *Semco Printing Ctr., Inc.*, 721 F.2d 886 (2d Cir. 1983) | 6 |
| *NLRB* v. *VSA, Inc.*, 24 F.3d 588 (4th Cir.), cert. denied, 513 U.S. 1041 (1994) | 6 |
| *NLRB* v. *Wabash Transformer Corp.*, 509 F.2d 647 (8th Cir.), cert. denied, 423 U.S. 827 (1975) | 6 |
| *NLRB* v. *Whitney Museum of Am. Art*, 636 F.2d 19 (2d Cir. 1980) | 6 |
| *Warner Press, Inc.* v. *NLRB*, 525 F.2d 190 (7th Cir. 1975), cert. denied, 424 U.S. 943 (1976) | 6 |


Statute:


| | |
|---|---|
| National Labor Relations Act, 29 U.S.C. 151 *et seq.*: | |
| § 8(a)(1), 29 U.S.C. 158(a)(1) | 4 |
| § 8(a)(5), 29 U.S.C. 158(a)(5) | 4 |

# In the Supreme Court of the United States

No. 98-1758

PARKWOOD DEVELOPMENTAL CENTER, INC. AND TEMPLETON SCHOOL OF SPECIAL EDUCATION, INC., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD AND UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1996

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 165 F.3d 41 (Table). The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 4a-13a) is reported at 325 N.L.R.B. No. 89. The Board's underlying decision and certification of representative (App., *infra*, 1a-3a), and the hearing officer's report on petitioners' objections to the certification election (App., *infra*, 4a-9a), are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on December 1, 1998. A petition for rehearing was denied on February 4, 1999 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on May 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioners operate an intermediate care facility for mentally retarded persons and a special education institute in Valdosta, Georgia. Pet. App. 5a. Petitioners are joint employers of approximately 173 employees. *Id.* at 6a; App., *infra*, 4a-5a. On January 31, 1997, United Food and Commercial Workers Union, Local 1996, AFL-CIO, filed a petition with the National Labor Relations Board for a representation election in a unit consisting of all of petitioners' employees. *Id.* at 4a. On April 10, 1997, pursuant to a stipulated election agreement, the Board conducted a secret-ballot election among the unit employees, which the union won by a vote of 97 to 40, with three challenged ballots. *Id.* at 4a-5a.

Petitioners filed objections to the election with the Board. One objection alleged that the union had "provided some employees eligible to vote in the election with a limited waiver of initiation fees," contrary to *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). App., *infra*, 6a. After an evidentiary hearing, the hearing officer issued a report recommending that petitioners' objection be overruled. *Id.* at 9a. The hearing officer found that, on April 6, 1997, the union had mailed a certificate to all 173 unit employees at the addresses that appeared on the voter-eligibility, or

"*Excelsior* list" compiled by petitioners. *Id.* at 7a.[1] The union's certificate stated, in pertinent part: "This is to certify that the bearer, whose name appears on the front of this certificate, shall not be required to pay initiation fees of any kind, nor any fees other than the regular monthly dues, which shall not be required of the bearer until a union agreement has been signed by the employer after it has been voted upon by employees of the bargaining unit and accepted by a majority vote." *Id.* at 7a. The hearing officer also found that nine of the 173 certificates were returned by the U.S. Postal Service as "undeliverable." *Ibid.*

The hearing officer explained that, under *Savair*, a union may not waive employees' initiation fees if the waiver is "conditioned upon the signing of a union authorization card prior to election," but the union may waive employees' initiation fees "if the waiver was extended to those who join the union after the election as well as before." App., *infra*, 8a. She found it "clear from the evidence that the [union's] certificate did not require that employees give pre-election support to the Union in exchange for a waiver of initiation fees." *Ibid.*[2] The hearing officer further explained that, while nine of

---

[1] Pursuant to *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), the employer is required prior to an election to provide the Board with the names and addresses of all eligible voters. The Board then provides this list, commonly referred to as the "*Excelsior* list," to the other parties to the election.

[2] Indeed, the hearing officer noted petitioners' concession that the union's certificate "does not condition waiver of fees upon pre-election support for the Union." App., *infra*, 8a. Rather, petitioners "attempt[ ] to expand *Savair* to make the certificate's assignation to a specific bearer an unlawful condition," an argument which the hearing officer concluded had "no support in *Savair*." *Ibid.*

the 173 certificates were returned by the U.S. Postal Service as "undeliverable," *id.* at 7a, petitioners "cannot expect to benefit from [their] own provision of erroneous mailing addresses" to the union. *Id.* at 8a n.15.

Petitioners filed exceptions to the hearing officer's recommendation, but the Board adopted the hearing officer's disposition of petitioners' objection to the election and certified the union as the employees' exclusive bargaining representative. App., *infra*, 1a-3a. When petitioners subsequently refused to bargain, the union filed an unfair labor practice charge. The Board's General Counsel issued a complaint alleging that petitioners' refusal violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5) and (1). Finding that all issues relevant to the unfair labor practice complaint were, or could have been, litigated in the representation proceeding, the Board, on summary judgment, concluded that petitioners had violated the Act as alleged, and ordered them to bargain upon request with the union. Pet. App. 4a-13a.

2. The court of appeals enforced the Board's order in an unpublished decision. Pet. App. 1a-3a. The court concluded that "substantial evidence supports the Board's decisions to overrule [petitioners'] election objections and certify the Union as the bargaining representative for its workers." *Id.* at 3a. The court found petitioners' contention that the union's waiver of initiation fees violated *Savair* to be "meritless." *Ibid.*

## ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 7-10) that the decision below conflicts with *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). In *Savair*, a union had, prior to a representation election, announced a selective waiver of its initiation fee only for employees who signed union recognition slips before the election. Employees who did not sign such slips would not get the benefit of the fee waiver, and some employees were under the impression that they would have to pay a "fine" if the union were certified but they had failed to sign the slips. *Id.* at 272-273. The Court held that the union's selective waiver of its initiation fee impermissibly interfered with employee free choice to vote for or against union representation in two ways. First, the union was able to "buy endorsements" and thus "paint a false portrait of employee support during its election campaign" by using this false showing of strength as a "campaign tool" in seeking additional employee support. *Id.* at 277. Second, at least some employees might have felt obligated, when they subsequently voted in the election, "to carry through on their stated intention to support the union." *Id.* at 278.

The Court also recognized, however, that a union has a legitimate interest in waiving its initiation fee for new members, when the waiver is "available not only to those who have signed up with the union before an election but also to those who join after the election." 414 U.S. at 274 n.4. As the Court pointed out, employees may be reluctant to pay money to a union before the union shows that it can do anything for them; a waiver of initiation fees "remove[s] this artificial obstacle to [employees'] endorsement of the union." *Ibid.* (quoting *Amalgamated Clothing Workers* v. *NLRB*, 345 F.2d 264, 268 (2d Cir. 1965)). "[A] union's promise of temporary waiver of dues for all potential

union members may serve to counteract an oft-used management argument that unions require workers to pay dues without guaranteeing the receipt of any tangible benefits." *NLRB* v. *Wabash Transformer Corp.*, 509 F.2d 647, 649 (8th Cir.), cert. denied, 423 U.S. 827 (1975). Accordingly, since *Savair*, the Board and the courts of appeals have consistently held that offers to waive fees extended to all employees currently in the work force, regardless of whether they join the union before or after the election, do not interfere with employee free choice in representation elections and therefore are not improper inducements under *Savair*.[3]

2. Petitioners do not take issue with the principle that a union's offer to waive initiation fees that extends to all employees in the bargaining unit is permissible under *Savair*. Rather, petitioners contend (Pet. 9) that the union's waiver of initiation fees was improper because nine of the 173 unit employees did not actually receive the certificates mailed to them by the union. There is no merit to that contention.

Contrary to petitioners' suggestion, the propriety of the union's fee waiver does not turn on whether each and every unit employee actually received a certificate from the union memorializing the offer. Rather, the issue is whether the fee waiver was available to all employees and was not conditioned on pre-election support for the union. See *NLRB* v. *Semco Printing Ctr., Inc.*, 721 F.2d 886, 889 (2d Cir. 1983) (fee waiver

---

[3] See, *e.g.*, *NLRB* v. *VSA, Inc.*, 24 F.3d 588, 594 (4th Cir.), cert. denied, 513 U.S. 1041 (1994); *NLRB* v. *Whitney Museum of Am. Art*, 636 F.2d 19, 21 (2d Cir. 1980); *Molded Acoustical Prods., Inc.* v. *NLRB*, 815 F.2d 934, 937 (3d Cir.), cert. denied, 484 U.S. 925 (1987); *Warner Press, Inc.* v. *NLRB*, 525 F.2d 190, 196-197 (7th Cir. 1975), cert. denied, 424 U.S. 943 (1976).

proper where availability was not limited "only to those who attended the meetings" at which union informed employees of the offer); *De Jana Indus., Inc.*, 305 N.L.R.B. 294, 294 & n.5 (1991) (fee waiver proper where no employee was "effectively exclude[d] * * * from participation in the offer"). Here, although the certificates of nine employees were returned by the U.S. Postal Service as "undeliverable," nothing in the record suggests that the union, on account of that circumstance, would have declined to honor the fee waiver as to those employees. Accordingly, the Board reasonably concluded that the union's fee waiver was proper under *Savair*.

Petitioners also contend (Pet. 9-10) that "Parkwood was not required to insure 100% accuracy" of the addresses on the *Excelsior* list and, therefore, that "it was at the Union's risk to mail the certificates to the employees' addresses as shown on the *Excelsior* list." Petitioners' argument, however, misses the point. The issue here is not whether the union bore the "risk" identified by petitioners. Rather, the question is whether the fee waiver was available to all unit employees, and the Board reasonably answered that question in the affirmative.[4] Particularly in view of the union's wide margin of victory in the election (97 to 40), the Board acted within its discretion in overruling petitioners' objection to the election. See App., *infra*, 9a n.19; cf. *Savair*, 414 U.S. at 278 (noting that "the change of just one vote" would have resulted in a tie).

---

[4] Moreover, as the hearing officer noted (App., *infra*, 8a n.15), to conclude that the union's otherwise proper fee waiver was invalid merely because a few employees did not actually receive certificates would permit petitioners "to benefit from [their] own provision of erroneous mailing addresses" to the union.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*

FREDERICK L. FEINSTEIN
*General Counsel*
LINDA SHER
*Associate General Counsel*
NORTON J. COME
*Deputy Associate General Counsel*
JOHN EMAD ARBAB
*Attorney*
*National Labor Relations Board*

MAY 1999

**APPENDIX A**

GFH
Valdosta, GA

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

---

Case 12-RC-8055

PARKWOOD DEVELOPMENTAL CENTER, INC.
AND TEMPLETON SCHOOL OF SPECIAL EDUCATION,
INC., AS JOINT EMPLOYERS, EMPLOYER

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 1996,
AFL-CIO, CLC, PETITIONER

---

**DECISION AND CERTIFICATION OF REPRESENTATIVE**

The National Labor Relations Board has considered objections to an election held April 10, 1997, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 97 for and 40 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's

findings[1] and recommendations,[2] and finds that a certification of representative should be issued.

**CERTIFICATION OF REPRESENTATIVE**

IT IS CERTIFIED that a majority of the ballots have been cast for United Food and Commercial Workers Union, Local 1996, AFL-CIO, CLC, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees of the Employer including custodians, housekeeping aides, unit housekeepers, laundry employees, maintenance employees, car/bus drivers, horticulturists, cooks, assistant cooks, dietary aides, dietary AM/PM janitors, social work technicians, direct care staff employees, direct care team leaders, medication nurses, treatment nurses, infection control nurses, physical health records nurses, transportation and appointment specialists, behavior program aides, activities center staff, behavior program aide/data specialists, transportation aides, sensorimotor therapists, and teacher aides, but not including receptionist, secretary to the administrator, purchasing coordinator, accounting/bookkeeper, clerical assistant for Templeton School, QMR records audi-

---

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations overruling Employer Objections 2-4 and 7.

tor, clinical records staff, computer data and program specialist, computer specialist and assistant to Personnel Director, professional employees, managerial employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., November 7, 1997.

William B. Gould IV, Chairman

Sarah M. Fox, Member

John E. Higgins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX B

[Excerpts from Hearing Officer's Report]

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION TEN

---

Case 12-RC-8055

PARKWOOD DEVELOPMENTAL CENTER, INC.
AND TEMPLETON SCHOOL OF SPECIAL EDUCATION,
INC., AS JOINT EMPLOYERS, EMPLOYER

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1996,
AFL-CIO, CLC, PETITIONER

---

### HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

The petition in the above-referenced proceeding was filed January 31, 1997. Pursuant to Stipulated Election Agreement approved on February 25, 1997, an election by secret ballot was conducted on April 10, 1997, among the employees of Parkwood Developmental Center, Inc. and Templeton School of Special Education, Inc., as Joint Employers (hereafter referred to as the Employer)[1] in the stipulated appropriate unit to determine

---

[1] All full-time and regular part-time employees of the Employer including custodians, housekeeping aides, unit housekeepers, laundry employees, maintenance employees, car/bus

the question concerning representation. Upon conclusion of the balloting, the parties were furnished a tally of ballots which showed that of approximately 173 eligible voters, 97 cast valid votes for the Petitioner, 40 cast valid votes against the Petitioner, and 3 cast challenged ballots. The challenged ballots were insufficient in number to affect the outcome of the election. On April 17, 1997, the Employer filed timely objections to the election and a copy thereof was duly served upon the Petitioner.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of the issues raised by the Employer's Objections was conducted, and thereafter, on May 2, 1997, the Regional Director of Region 12 issued and served on the parties an Order Directing Hearing on Objections and Notice of Hearing which directed that a hearing be held for the purpose of receiving evidence to resolve the issues raised by the Employer's Objections. Pursuant to the Regional Director's Order, a hearing was held on May 15, 1997 at Valdosta, Georgia, and continued on May 29, 1997 at

---

drivers, horticulturists, cooks, assistant cooks, dietary aides, dietary AM/PM janitors, social work technicians, direct care staff employees, direct care team leaders, medication nurses, treatment nurses, infection control nurses, physical health records nurses, transportation and appointment specialists, behavior program aides, activities center staff, behavior program aide/data specialists, transportation aides, sensorimotor therapists, and teacher aides, but not including receptionist, secretary to the administrator, purchasing coordinator, accounting/bookkeeper, clerical assistant for Templeton School, QMR records auditor, clinical records staff, computer data and program specialist, computer specialist and assistant to Personnel Director, professional employees, managerial employees, guards and supervisors as defined in the Act.

Atlanta, Georgia, before the undersigned hearing officer, duly designated for that purpose. The Employer and the Petitioner appeared and participated. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the conclusion of the hearing and on the record, the parties were permitted to file briefs, which were considered. Upon the entire record of the case and from my observations of the witnesses,[2] and after examination of all exhibits, I make the following findings and recommendations to the Board.

* * * * *

OBJECTION 6

*Union representatives and agents provided some employees eligible to vote in the election with a limited waiver of initiation fees and dues payments in violation of the standards adopted in Savair Manufacturing Corp., 94 S. Ct. 495 (1973).*

---

[2] In evaluating the credibility of the witnesses, I have considered their general demeanor, closely observed while testifying under oath, partisan interests, guarded or indirect answers, conclusory and conflicting testimony as distinguished from fact, self-serving answers, leading questions by Counsel, general attitude, memory for detail, and ability to comprehend the nature of the questions and answers thereto. Other criteria bearing on credibility may from time to time be discussed with respect to particular witnesses. However, where unnecessary, I shall not allude to testimony I deem incredible.

In support of this objection, the Employer presented evidence that the Union mailed to employees certificates entitling the bearer to a waiver of initiation fees.

The front of the card read, in pertinent part: "No Initiation Fee Required. This certificate is valuable to you DON'T LOSE IT!" The back of the card read, in pertinent part: "This is to certify that the bearer, whose name appears on the front of this certificate, shall not be required to pay initiation fees of any kind, nor any fees other than the regular monthly dues, which shall not be required of the bearer until a union agreement has been signed by the employer after it has been voted upon by employees of the bargaining unit and accepted by a majority vote." and "This certificate will be recognized as valid only if presented to the union not later than thirty (30) days after the union agreement is in effect with present employer." On April 6, the Union mailed these cards to all employees listed on the *Excelsior* list.[14] The United States Postal Service returned nine of the cards as undeliverable.

---

* * * * *

[14] The Employer's brief asserts that the "Petitioner, itself, stipulated that it did not mail the Certificate to all eligible voters, it only mailed the Certificate to an "overwhelming majority" of the employees in the bargaining unit. (Tr. 227)." In fact, Petitioner's counsel offered to stipulate that the Petitioner mailed waivers to the overwhelming majority of the employees of the bargaining unit. Petitioner's witness Robert Ellis testified immediately thereafter that "[the Petitioner] mailed them to the entire excelsior [sic] list that was considered as eligible employees to vote." The stipulation offered by the Petitioner's counsel was never entered.

The Employer argues first that the waiver was actually a gift certificate analogous to a five-dollar gift certificate to buy turkeys and, therefore, a prohibited benefit. Though the Employer cites numerous cases which hold that a Union may not distribute gifts during the critical period, it cites none that suggest that a waiver of initiation fees constitutes a gift, rather than a waiver of initiation fees.

In the alternative, the Employer argues that the certificate was an unlawful waiver of initiation fees. In *NLRB v. Savair Manufacturing Company*, 414 U.S. 270 (1973), the Supreme Court held that a waiver of initiation fees conditioned upon the signing of a union authorization card prior to election is improper and will result in setting aside an election. However, in reaching this finding, the Court specifically found lawful a waiver of such fees if the waiver was extended to those who join the union after the election as well as before. *See* 414 U.S. at 272 n. 4. While admitting that the Petitioner's certificate does not condition waiver of fees upon pre-election support for the Union, the Employer attempts to expand *Savair* to make the certificate's assignation to a specific bearer an unlawful condition. There is no support in *Savair* or other cases the Employer cited for such an interpretation. It is clear from the evidence that the Petitioner's certificate did not require that employees give pre-election support to the Union in exchange for a waiver of initiation fees. Moreover, the waiver was sent to all eligible employees at the addresses provided to the Petitioner by the Employer itself.[15]

---

[15] The Employer cannot expect to benefit from its own provision of erroneous mailing addresses. In any case, *Savair* does

* * * * *

**RECOMMENDATIONS**

Having fully considered all of the allegations both separately and cumulatively,[19] I find that Employer's Objections raise no material or substantial issues affecting the results of the election and hereby recommend that they be overruled.[20] As the Petitioner has received a majority of valid votes cast in the election, I further recommend that a Certification of Representative be issued.

Dated at Atlanta, Georgia, this 2nd day of September, 1997.

/s/ LISA Y. HENDERSON
LISA Y. HENDERSON
Hearing Officer
National Labor Relations Board
101 Marietta Tower, Suite 2400
101 Marietta Street, N.W.
Atlanta, Georgia 30323-3301

---

not require that initiation fees be waived from all employees. *See, e.g. Twilight Haven, Inc.*, 235 NLRB 1337, 1345 (1978).

[19] While not essential to my conclusions, I also note that the vote herein was not close.

[20] Pursuant to Section 102.69 of the Board's Rules and Regulations, any party, within 10 days from the date of issuance of this report, may file with the Board in Washington, D.C. eight (8) copies of exceptions hereto. Immediately upon filing such exceptions, the party filing same shall serve a copy thereof on the other party and shall file a copy with the Regional Director. If no exceptions are filed hereto, the Board will adopt these recommendations.